

¹ Mr. Griffith represents both Elizabeth Reusser and her daughter, Brandy in this matter. For purposes of this appeal there is no dispute between the parties that Brandy Reusser is entitled to and has received benefits under the Workers Compensation Act, K.S.A. 44-501 et seq. (Act) as she was a dependent at the time of her father's death on July 29, 2003 attending an institution of higher learning. Any conflict that might exist from Mr. Griffith's dual representation has been waived. The sole issue in this appeal is whether Elizabeth Reusser is decedent's common law wife and thereby entitled to benefits.

ISSUES

The ALJ concluded Elizabeth Reusser was the common law wife of Randall S. Reusser (Decedent) on July 29, 2003, the date Decedent was killed while working for respondent. He concluded that Ms. Reusser and Decedent had both a “present marriage agreement” and that “they were holding themselves out to the public as being husband and wife.”² As such, he found the statutory elements necessary to establish a common law marriage were met and Ms. Reusser was, therefore, entitled to survivor’s benefits as the Decedent’s common law wife.³

Respondent contends the ALJ erred in concluding that Elizabeth Reusser was Decedent’s common law wife. Respondent believes Ms. Reusser’s testimony as well as the testimony of other witnesses, negates an essential element of a common law marriage, namely a present marriage agreement. According to respondent, the greater weight of the evidence and Ms. Reusser’s own conduct demonstrates, at best, that she had a future intent to remarry Decedent. Respondent also argues that neither Decedent nor Ms. Reusser consistently held themselves out as married to the public following their decision to live together in December 2002. Thus, two of the necessary statutory elements have not been established. Accordingly, respondent asks that the Board reverse the ALJ’s Award, affirming only those benefits that are properly payable to the sole minor survivor, Brandy Reusser.⁴

Ms. Reusser argues that there is ample evidence that she and Decedent not only held themselves out to the public as man and wife, but that a present marital contract existed between them at the time of Decedent’s death. She maintains the parties’ separate bank accounts and tax returns and their intention to have a religious ceremony to renew their vows do not defeat the existence of the marital relationship under Kansas law. Accordingly, Elizabeth Reusser requests the Board affirm the Award in all respects.

The sole issue to be resolved is whether Elizabeth Reusser was the common law wife of Decedent on July 29, 2003. In particular, the Board must decide whether, as of the

² ALJ Award (July 28, 2004) at 3.

³ At oral argument, counsel for both parties agreed that if Elizabeth Reusser is found to be Decedent’s common law wife, she is entitled to \$20,000 in a lump sum as well as \$220 per week commencing July 29, 2003 until May 12, 2004. At that point in time, Brandy Reusser, the parties’ 22 year old daughter ceased attending college and as a result, she was no longer entitled to weekly survivor’s benefits under K.S.A. 44-510b(a)(3). From that date forward, Ms. Reusser would then be entitled to the entire weekly benefit in the sum of \$440 until the balance of \$250,000 had been paid.

⁴ Brandy Reusser has received \$20,000 in a lump sum as well as \$220 in weekly payments since her father’s death. In the event Elizabeth Reusser is not found to be Decedent’s common law wife, she is entitled to an additional \$20,000 under K.S.A. 44-510b(a) as well as an additional \$220 per week from July 29, 2003 until May 12, 2004.

date of Decedent's accident, he and Ms. Reusser had a present marriage agreement and held themselves out to the public as married.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ correctly noted that our state has long recognized the validity of a common law marriage.⁵ In order to establish such a relationship, three elements must be shown. First, a capacity to marry; second, a present marriage agreement; and third, a holding out of each other as husband and wife to the public.⁶ The one alleging a common law marriage has the burden of proof.⁷

The parties concede both Decedent and Elizabeth Reusser had the capacity to marry. They had been legally divorced since April 2002 and had taken steps to separate their property in recognition of their new, single legal status as unmarried individuals. They filed separate tax returns in 2002, they each acquired separate policies for car and health insurance. Retirement funds were segregated. Consistent with the parties' property settlement agreement, Ms. Reusser was removed from the title on the family home and Decedent was contractually obligated to pay her a portion of the parties' equity.

The difficulty arises from the parties' conduct following their divorce, in particular starting in December 2002 and continuing up until Decedent's death in July 2003. The Board must decide whether their conduct satisfies the requisite second and third elements. Namely, whether Ms. Reusser and the Decedent had a present marriage agreement and held themselves out to the public as married.

The ALJ concluded the evidence established both elements. Specifically, he noted conversations between Decedent and his daughter, Brandy, when Decedent expressed the belief that in spite of the legal proceedings, "he never considered himself divorced".⁸ He further noted that the two renewed their relationship beginning in December 2002 and that Ms. Reusser moved back into the family home. The two of them celebrated what Ms. Reusser believed was their 24th wedding anniversary in December 2002 at a local bed and breakfast. Elizabeth Reusser specifically mentioned the special nature of their visit in a

⁵ See e.g., *Schrader v. Schrader*, 207 Kan. 349, 484 P.2d 1007 (1971).

⁶ *Sullivan v. Sullivan*, 196 Kan. 705, 413 P.2d 988 (1966).

⁷ *In re Estate of Hendrickson*, 248 Kan. 72, 73, 805 P.2d 20 (1991).

⁸ ALJ Award (July 28, 2004) at 3-4.

written “thank you” to the owners of the bed and breakfast. Thereafter, Ms. Reusser received a note from Decedent on Valentines Day in 2003 on which he wrote “[y]ou are my best friend and the best wife that I could ever have”.⁹ After his father’s death in February 2003, Decedent arranged for himself and Beth [Elizabeth] Reusser to be listed as survivors in the obituary. In fact, while planning his father’s funeral, Brandy, his daughter, recalls him saying “I want me, my wife Beth and my two kids listed in the obituary.”¹⁰

After they resumed living together, Decedent placed Ms. Reusser on his automobile insurance policy. There is evidence within the record that Ms. Reusser contributed towards the parties’ monthly mortgage payment although they maintained separate bank accounts. There is no evidence they made any decision with regard to their 2003 tax returns although they had filed taxes separately for the tax year 2002. Ms. Reusser began wearing her wedding ring in the Spring of 2003. She also provided a list of individuals to whom she and Decedent held themselves out to be married. After Decedent’s death, Ms. Reusser received a lump sum as the surviving spouse under Decedent’s Retirement Plan.¹¹

Both Ms. Reusser and Decedent spoke of their desire to renew their marital vows after they got back together. When examined and taken as a whole, these expressions consistently reference the parties’ religious considerations rather than a concern over the legal aspect of their relationship. Religion played a part in this couple’s relationship particularly in light of the marital difficulties and their ultimate divorce. They were both concerned that by resuming their relationship following a divorce, they were committing a “sin”. Thus, there was a desire on the part of both, especially Decedent, to renew their vows. However, there was no specific plan for the two of them to remarry or renew their vows. In fact, based upon the testimony of their minister, in the eyes of their church, Decedent and Ms. Reusser remained married despite their divorce. However, Reverend Boyd admitted he would have performed a marriage or renewal ceremony if asked. The Board notes that subsequent formal marriage does not necessarily defeat a finding of an earlier common law marriage.¹²

Although some of the formal documentation that had once delineated their legal relationship such as tax returns, insurance, retirement accounts, monthly bills, and the property settlement agreement remained separate and unchanged following their divorce, each those factors, standing alone, are not necessarily determinative. Rather, it is the parties’ present intent based upon all the facts, from December 2002 up until Decedent’s death that is key.

⁹ *Id.* at 4.

¹⁰ Brandy Reusser Depo at 14.

¹¹ R.H. Trans., Ex. 9.

¹² See *In the Matter of the Estate of Antonopoulos*, 268 Kan. 178, 993 P.2d 637 (1999).

It is clear from the evidence that these two had, quite purposefully, reestablished their marital relationship. They held themselves out to the public as being married and went so far as to celebrate on the date that would have been their 24th wedding anniversary. Decedent expressly stated that he never felt divorced from Ms. Reusser. They resumed living in the family home and by the Spring of 2003 she resumed wearing her wedding ring. He referred to her as his wife in personal notes to her and in his father's obituary. Based upon these facts the Board is persuaded that these two had formed a present intent to be married before Decedent's death in July 2003. The Board affirms the ALJ's Award in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated July 28, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

This member respectfully dissents from the majority's opinion. While there is some evidence to suggest these two people held themselves out as married, there is specific evidence that the two had no present marriage agreement, the lack of which is fatal to Ms. Reusser's claim. Following the divorce, Rolland Reusser, Decedent's brother, specifically asked Decedent whether he "wanted to marry her [Beth Reusser] again and he said

yeah.”¹³ Rolland Reusser also talked to Ms. Reusser following Decedent’s death and according to him - “she did tell me that they didn’t have any definite date set, but they were married on I think like December 22nd the first time, and she -- she said that she had strong feelings that he was wanting to set something up for that date again to get remarried on that same day.”¹⁴ He was then asked “[A]nd what was her [Ms. Reusser’s] feeling about getting married again in December, did she want to?” to which he responded “Yeah...Yes, sorry about that.”¹⁵ Finally, he testified that Elizabeth Reusser expressed regret that she was unable to get remarried before Decedent passed away.¹⁶

Based upon this evidence, this member finds there was no present marital agreement between Decedent and Elizabeth Reusser. Although the agreement need not be in any particular form, it is essential that there be a present mutual consent to the marriage between the parties.¹⁷ Here, the evidence is such that while both parties certainly wanted the relationship to return to its pre-divorce status, they had a *future* intent to remarry. In this member’s opinion, this does not constitute a present intent to *be* married. Under Kansas law, failure to establish this necessary element defeats Ms. Reusser’s claim for survivor’s benefits.

BOARD MEMBER

c: Jeff Griffith, Attorney for Claimants
Jeffrey King, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹³ Rolland Reusser Depo. at 21.

¹⁴ *Id.* at 26.

¹⁵ *Id.* at 26.

¹⁶ *Id.* at 27.

¹⁷ *In re Estate of Antonopoulos*, 269 Kan. 178,192, 993 P.2d 637, 647 (1999).